81-2287

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. _____

WILLIAM ROBERT WOOLERY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Fifth Circuit improperly ignored factual findings by the trial court, of the United States District Court for the Southern District of Texas.

2. Whether Petitioner's arrest, the search of his vehicle and seizure of evidentiary items therein, and his unlawful detention and resultant identification, violated Petitioner's rights under the Fourth Amendment to the United States Constitution.

SUBJECT INDEX

	Page
QUESTIONS PRESENTED FOR REVIEW	1
THE OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT AND AUTHORITIES	3
QUESTION 1 RESTATED	3
1. *Whether the Court of Appeals for the Fifth Circuit improperly ignored factual findings by the trial court, of the United States District Court for the Southern District of Texas.*	
QUESTION 2 RESTATED	9
2. *Whether Petitioner's arrest, the search of his vehicle and seizure of evidentiary items therein, and his unlawful detention and resultant identification, violated Petitioner's rights under the Fourth Amendment to the United States Constitution.*	
CERTIFICATE OF SERVICE	10
APPENDIX A—Original Opinion United States Court of Appeals, Fifth Circuit	A-1
APPENDIX B—Order on Petition for Rehearing	B-1
APPENDIX C—Oral Findings of the Trial Court, The Honorable Carl O. Bue, United States District Judge, Southern District of Texas.	C-1

LIST OF AUTHORITIES

CASES	Page
Campbell v. United States, 373 U.S. 487 (1963)	4
Terry v. Ohio, 392 U.S. 1 (1968)	4, 10
United States v. Carillo, 561 F.2d 1125 (5th Cir. 1977)	4
United States v. Crouch, 566 F.2d 1311 (5th Cir. 1978)	4
United States v. Cruz, 581 F.2d 535 (5th Cir. en banc 1978)	4
United States v. Griffin, 555 F.2d 1323 (5th Cir. 1977)	4
United States v. Juarez, 573 F.2d 267 (5th Cir. 1978)	4

UNITED STATES CONSTITUTION	
Fourth Amendment	2, 9

UNITED STATES STATUTES	
18 U.S.C. § 2	2
21 U.S.C. § 846	2
21 U.S.C. § 952(a)	2
28 U.S.C. § 1254(1)	2

FEDERAL RULES OF CIVIL PROCEDURE	
Rule 52	2, 3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE OPINION BELOW

The original opinion of the Court of Appeals for the Fifth Circuit was rendered on March 15, 1982, and is reported at ____F.2d____; rehearing was denied on April 15, 1982. A copy of the Opinion is appended hereto.

JURISDICTION

Grounds on which jurisdiction of the Supreme Court is invoked:

A. The Court of Appeals for the Fifth Circuit rendered its Opinion on March 15, 1982.

B. Petitioner's Motion for Rehearing was overruled on April 15, 1982.

C. The Supreme Court has jurisdiction herein by reason of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATUTORY PROVISION INVOLVED

Rule 52, Federal Rules of Civil Procedure, states in part:

> "* * * findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses * * *."

STATEMENT OF THE CASE

Petitioner was charged by indictment with the offense of importation of cocaine (Count I—a violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2) and attempted possession with intent to distribute cocaine (Count II —a violation of Title 21 U.S.C. § 846). The trial court held an evidentiary hearing on Petitioner's Motion to Suppress Evidence and granted the Motion, suppression

evidence gained as a result of Petitioner's arrest and detention. The trial court entered oral findings which have been reproduced as part of the Appendix to this Petition. The pertinent findings were that Petitioner had been arrested without a warrant by officers who did not have probable cause for his arrest, but rather had only "reasonable suspicion" to justify a limited inquiry; and that the officers' actions exceeded the scope of their authority to act. The pertinent findings were that Petitioner had been arrested without a warrant by officers who did not have probable cause for his arrest, but rather had only "reasonable suspicion" to justify a limited inquiry; and that the officers' action exceeded the scope of their authority to act. The Court of Appeals ignored these findings without regard to whether they were "clearly erroneous" and reversed the judgment of the trial court.

ARGUMENT AND AUTHORITIES

QUESTION 1 RESTATED

1. Whether the Court of Appeals for the Fifth Circuit improperly ignored factual findings by the trial court, of the United States District Court for the Southern District of Texas.

It is a well-established rule in the Fifth Circuit as well as the Supreme Court that findings of fact made by a Trial Court shall not be set aside unless they are clearly erroneous or amount to an abuse of discretion. As Rule 52 of the Federal Rules of Civil Procedure states:

> "* * * findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to

> the opportunity of the trial court to judge the credibility of the witnesses * * *."

The United States Supreme Court and the Fifth Circuit have consistently held that the clearly erroneous/abuse of discretion rule applies in criminal cases. *Campbell v. United States*, 373 U.S. 487 (1963); *United States v. Juarez*, 573 F.2d 267 (5th Cir. 1978); *United States v. Crouch*, 566 F.2d 1311 (5th Cir. 1978); *United States v. Carillo*, 561 F.2d 1125 (5th Cir. 1977); *United States v. Griffin*, 555 F.2d 1323 (5th Cir. 1977); *United States v. Cruz*, 581 F.2d 535 (5th Cir. en banc 1978). Without referring to this clearly established rule, the Panel opinion ignores the fact findings by the Trial Judge that probable cause for arrest did not exist; only reasonable suspicion. Further, the Trial Judge found that the agents' actions constituted an arrest, rather than an investigatory stop, and thus that the conduct of the agents exceeded the factual basis for acting. The record amply supports these findings. The testimony of the DEA agent-in-charge, Donald Perry, was to the effect that he ordered only a "Terry"[1] stop. Further, the testimony of the arresting officer, Lt. Collman, acknowledged that Collman was directed only to make a "Terry" stop.

DEA agent-in-charge, Donald Perry testified:

> "A. * * * so I instructed the Agent who still had the Mercedes under surveillance, based upon these *suspicious activities* that they had conducted up to this point, *to approach these individuals and see what their purpose was there at the airport.*
>
> "Q. And do you remember what agents you were talking to that you instructed to approach the vehicle?

1. *Terry v. Ohio*, 392 U.S. 1 (1968).

"A. Well, again, it was just a general radio transmission for the surveillance agents to go ahead and approach the vehicle at that point. * * *" (Vol. I, Tr. pp. 23, 24, emphasis added)

"Q. (On cross-examination) Did you order the other agents to stop the two people in the Mercedes?

"A. No one stopped them. They were sitting there. I told the agents—

"Q. Arrest the two people in the Mercedes?"

"A. I told the other agents on surveillance to approach the people in the vehicle and ascertain what their purpose was in being at the airport. * * * At that point, based on the suspicious activities of these people, I told the people to approach them and see what they were doing." (*Ibid.*, pp. 63, 64).

Later in the hearing, Lt. Collman, the officer who actually made the arrest, testified as follows:

"Q. [On direct examination] What happened then?

"A. O.K. Once again we radioed Perry and I told him, I said, 'I definitely believe these people are observing that pick up truck and those people'.

"Q. And what did Officer Perry tell you?

"A. Perry told us once again to keep them under surveillance. * * *

* * *

"Perry finally got back on the radio, I guess after he talked to people inside. He said—* * * at this time Perry got on the police radio and *advised us to go ahead and approach the people and ascertain their identification.*" (*Ibid.*, pp. 198-200). (emphasis added)

"Q. [On cross-examination] And, of course, when you got the order on the radio to detain the people

in the Mercedes, that order was broadcast generally to everyone that had a radio, wasn't it?

"A. Yes. We were asked to *identify* the people." (Vol. I, Tr. p. 4) (emphasis added)

Thus, the officers themselves never claimed to have probable cause for an arrest, only reasonable suspicion for a "Terry" limited-scope inquiry. What followed, of course, was full-blown arrest, beyond the scope of the justification for a "Terry" stop:

"Q. [Cross-examination of Lt. Collman] O.K. So, within just moments of the time the order came on the radio, you and the other officers had the Mercedes surrounded?

"A. Half a minute.

"Q. It didn't take long.

"A. No, sir.

"Q. And, of course, you had your guns drawn?

"A. Yes, sir.

"Q. Had some sort of identification on?

"A. Yes, sir.

"Q. And without any waste of time you and the other officers got both Mr. Woolery and Mr. Rebesher out of the Mercedes?

"A. They didn't immediately step out. We had to ask them a few times. In fact, we finally opened up the passenger's door.

"Q. Forced them out?

"A. No, we didn't force them out. They finally stepped out on their own.

"Q. I don't mean beat them up, but you used physical force to get them out of the car?

"A. Yes, sir. We opened the car door.

"Q. With your guns drawn?

"A. Yes, sir.

"Q. *It wasn't a matter of simply going up and asking them to identify themselves, was it?*

"A. Well, we believed they were involved in a—

"Q. I didn't ask you what you believed. Was it a matter of going up and simply saying 'My name is Lt. Collman, may I have your name, please, sir.' You didn't do that did you?

"A. No, sir. It was not.

"Q. You went up with your guns drawn and said, 'Get out of the car.' And got them out of the car.

"A. Yes, sir. We asked them to step out.

* * *

"Q. And I presume that you did a pat down search of both of the persons in the car, didn't you.

"A. Yes, sir.

"Q. Had them spread eagled on the car in some fashion.

"A. Yes, sir. Once we found the gun, we looked for more weapons.

"Q. And the fashion in which you had the two persons in the car was to have them place their hands on the car, spread their legs, get them in a position where they could not move without you being able to stop them.

"A. That's correct. Yes, sir.

"Q. With a posture that you were taught in your law enforcement training to put a suspect in so as to make it easy to have control over them?

"A. To our best advantage, yes, sir.

"Q. To get the advantage over the person—

"A. That's correct.

"Q. —put them in a position where they cannot move easily.

"A. Yes, sir.

"Q. And, of course, to anyone who might have been in the neighborhood walking by, it was obvious and visible, that you, as officers, had two men that you had spread-eagled on the car and were patting down, right?

"A. I imagine it would be the obvious assumption yes, sir.

"Q. Particularly with the guns drawn?

"A. Yes, sir.

"Q. Did either of you use handcuffs on either of the men on the car?

"A. I can't honestly say. I imagine we did, but I can't honestly say, I remember using them * * *

"Q. So, most likely you handcuffed Mr. Woolery behind his back?

"A. Yes, sir." (*Ibid.*, pp. 4-9)

Thus, the record fully supports the Trial Court's factual findings in that the officers themselves did not believe that they had probable cause to arrest and that thus the Trial Court found as a matter of fact that there was insufficient factual basis to form probable cause to arrest.

The Court of Appeals should have been limited to the factual findings made by the trial court. Instead, the Panel ignored the longstanding "clearly erroneous/abuse of dis-

cretion rule" and found, contrary to the testimony of the officers and the findings of the trial court, that probable cause for arrest existed. If the Panel decision is allowed to stand, it will overrule, *sub silentio*, at least in the Fifth Circuit, this well-established statutory and common law rule.

QUESTION 2 RESTATED

2. Whether Petitioner's arrest, the search of his vehicle and seizure of evidentiary items therein, and his unlawful detention and resultant identification, violated Petitioner's rights under the Fourth Amendment to the United States Constitution.

The trial court correctly decided the issue of Petitioner's unlawful arrest. In this regard, Petitioner reiterates the argument contained above regarding the supporting record for the court's findings. Quoting the trial court:

> "Now, based on these facts, the Court concludes that when the officers approached the car that the defendant was driving, they had no probable cause to make an arrest. All they had at that point was a reasonable suspicion that the occupants might be engaged in criminal activity.
>
> "I am citing the cases, see *Terry v. Ohio*, 392 U.S. 1; *Adams v. Williams*, 407 U.S. 143; *Brinegar v. U.S.*, 338 U.S. 160. Compare *U.S. v. Robinson*, 414 U.S. 218, and *Pennsylvania v. Mims*, 434 U.S. 106.
>
> "Proceeding only on reasonable suspicion, which is what we believe existed on these facts, under these circumstances, rather than on probable cause, the officers had the authority only to approach the car and briefly question the occupants to determine their identity and what they were doing there.

"See *Adams v. Williams*, 407 U.S. 143; *Terry v. Ohio*, 392 U.S. 1; *Delaware v. Prouse*, 440 U.S. 648."

The full statement of the trial court is reproduced as part of the Appendix herein, infra. Petitioner refers to it here as though fully set out. The trial court correctly analyzed the facts and applied the proper law to those facts. Unless *Terry v. Ohio*, supra, is to be overruled, the trial court's suppression order should be upheld, and the Opinion and Judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dick DeGuerin, hereby certify that two copies of the foregoing Petition for Writ of Certiorari has been furnished to the United States Attorney for the Southern District of Texas and three copies have been furnished to the Solicitor General of the United States, by certified mail, return receipt requested, this _____ day of June, 1982.

DICK DEGUERIN

APPENDIX A

Original Opinion
United States Court of Appeals, Fifth Circuit

UNITED STATES of America,
Plaintiff-Appellant,

v.

William Robert WOOLERY,
Defendant-Appellee.

No. 80-2156.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

March 15, 1982.

United States appealed from an order of the United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., granting a pretrial motion to suppress evidence obtained following the arrest of defendant. The Court of Appeals, Gee, Circuit Judge, held that probable cause existed to warrant defendant's arrest.

Reversed.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, GOLDBERG and GEE, Circuit Judges.

GEE, Circuit Judge:

The United States appeals from an order granting a pretrial motion to suppress evidence against defendant William Robert Woolery. The court determined that the officers had illegally arrested Woolery because they did not have the requisite probable cause to arrest.

On August 6, 1979, United States Customs inspectors discovered cocaine secreted in a shipment of saddles from Colombia. The packages were addressed to one Richard Freedman, and a telephone number was listed on the packages. A Braniff Air Line agent called the telephone number, which proved to be that of an answering service, and left a message for Richard Freedman that the shipment had arrived. On the morning of August 9, 1979, a man identifying himself as Richard Freedman called Braniff and informed them that the package would be picked up later that day. "Richard Freedman" also called W. R. Zanes Warehouse and requested that it pick up the saddles from the airline and place them in their storage facility until they could be picked up later that afternoon.

When the warehouse employee showed up at Braniff to pick up the saddles, he was met by agents from the Drug Enforcement Administration ("DEA"), who informed him that cocaine had been smuggled in the saddles. The warehouse employee agreed to help make a controlled delivery of the saddles from the warehouse. The warehouse was then put under surveillance by the DEA agents, Customs agents, and officers from the Houston Police Department. Meanwhile, "Richard Freedman" telephoned the Suburban Delivery Company to arrange for pick up and delivery of the saddles requesting that a

driver meet him in the parking lot of a Denny's Restaurant near the warehouse. At about 2:00 p. m., a man identifying himself as Richard Freedman approached the driver, Lawrence Lopez, and paid him $200 cash for the storage and delivery fees. He directed Lopez to deliver the saddles to a Houston address and to leave the package outside if no one was there. When Lopez arrived in front of the warehouse, the surveillance agents posted inside and outside the warehouse noted that the delivery truck was being followed by a dark Mercedes with two occupants. When Lopez parked the truck and entered the warehouse, the Mercedes stopped directly behind the delivery truck and both occupants turned to look at the truck. They held a brief conversation and then took a left turn into a parking lot directly adjacent to the warehouse, across the street from the truck. After they parked, the driver got out of the Mercedes and, constantly looking at the delivery truck, walked around the rear of the car and went to its front, opening the hood. The surveillance agents testified that during this period the driver never looked at the engine of his car but instead peered through the open hood at the truck.

A DEA agent next directed Lopez to drive his truck to the rear of the building, so he went back outside and started his truck. The driver of the Mercedes then shut the hood and hurriedly entered the car. The surveillance agents followed immediately behind the Mercedes, apparently undetected. The truck backed up, drove to the first intersection, turned left, and immediately turned left again into the Zane's Warehouse parking lot. When the Mercedes reached the first intersection, the car stopped, and the occupants looked in both directions as if looking for something. They pulled out into the intersection,

stopped again, looked both ways, and held a brief conversation. The Mercedes then turned and pulled up parallel to Zane's Warehouse, where they momentarily stopped again. The Mercedes then drove around to a parking lot, parking where there was a view of the truck and the warehouse. The surveillance agents radioed this information to the officer in charge.

At the same time, Lopez had entered the warehouse and was interviewed by the DEA agents. Lopez described how "Richard Freedman" had directed him to pick up this package and deliver it to a Houston address. The agents knew that the address was that of the answering service building, because the telephone number of that answering service had been on the package of saddles and had been checked earlier by the agents. The officer in charge then directed the agents to approach the Mercedes and ascertain the identification of the occupants. The agents pulled up behind the Mercedes, blocking its exit. The driver of the Mercedes put his car in reverse and backed into the agents' car. After the impact, the officers closed on the Mercedes, with guns drawn, and ordered the occupants to get out of the car. When the occupants did not respond, an officer opened the door on the driver's side and observed a pistol in a visible side compartment. The occupants of the Mercedes, one of whom was defendant Woolery, were then arrested. Taken to the nearby Customs office, they were placed in a line-up. Lopez identified Woolery as the "Richard Freedman" who had approached him in the restaurant parking lot.

The district court found that the agents had reasonable suspicion, but not probable cause, as they approached the car. The court ruled that the action of the agents

constituted an arrest rather than an investigatory stop. The court therefore viewed this as an arrest not supported by probable cause, and suppressed all evidence that was the fruit of the arrest, including the lineup identification of Woolery by Lopez. The government contends that there was probable cause for an arrest and that the suppression order should therefore be reversed. In the alternative, the government argues that the officers' behavior did not constitute an arrest but was an investigatory stop requiring only "reasonable suspicion." Because we find that there was probable cause to make an arrest, we need not decide whether the actions technically constituted an arrest, and, for purposes of this opinion, we assume that an arrest was made when the officers approached Woolery in the Mercedes.

[1-3] Probable cause for an arrest exists when the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trustworthy information are sufficient in themselves to warrant in a person of reasonable caution the belief that an offense has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). In dealing with probable cause we deal—with probability. *Id.* at 175, 69 S.Ct. at 1310. These are not technical considerations, but rather factual and practical ones of every day life on which reasonable and prudent persons, not legal technicians, act. *Id.* A showing of probable cause requires far less evidence than that sufficient to support a conviction. *United States v. Ashcroft*, 606 F.2d 1167, 1171 (5th Cir. 1979). In determining probable cause, we must take into account the experience of the agents. "Conduct innocent in the eyes of the untrained may carry entirely different messages to the

experienced or trained observer." *United States v. Clark*, 559 F.2d 420, 424 (5th Cir. 1977). "Police officers need not personally observe overt criminal activity to have probable cause. The observation of unusual activity for which there is not legitimate, logical explanation can be the basis for probable cause." *United States v. Alexander*, 559 F.2d 1339, 1343 (5th Cir. 1977).

[4] The facts and circumstances of this case justify the arrest of Woolery on probable cause. Inside the warehouse, the officers learned that Lopez had been approached by "Richard Freedman" and that he was to leave a package known to contain cocaine outside of the answering service building that was listed on the package. Outside, the arresting officers and agents had observed the suspect (1) follow the truck for at least a short distance to the warehouse and park across the street from it; (2) get out of his car, open his hood, and maintain a steady surveillance of the truck with no attention to his car's motor; and (3) follow Lopez to the rear of the warehouse and, once more, position himself to observe the truck and driver. In *Alexander, supra*, this court found probable cause to arrest based on the officer's observation of the suspects' illogical commuting pattern between a state park and their motel. *Ibid.* In like vein, the agents in the instant case, though they did not observe Woolery commit an overt criminal act, witnessed the suspect engage in activity centering on known contraband, activity that had no legitimate or logical explanation. Woolery initially provoked suspicion when the agents saw him closely follow the delivery truck to the warehouse and then park across the street from it. Woolery's subsequent behavior, however, warranted more than suspicion. He got out of his car, opened his car

hood, and kept a steady watch of the truck without ever looking down at his own car's motor, an obvious pretext. When agents inside the warehouse instructed Lopez to move the truck, Woolery followed it to the rear of the warehouse and from there repeated his patent surveillance. These actions indicated to the agents that the suspect was not experiencing a mere general disorientation as to his location. Rather, Woolery's actions communicated to them his awareness of the delivery truck's smuggling mission. In effect, his conduct was so far removed from the boundaries of normal, legitimate activity that it justified the agents' belief that he was involved in the commission of a crime centered on the drug nexus.

[5] The question of probable cause turns on the law enforcement officer's evaluation of reasonable inferences from the facts known to him. *See United States v. Rash*, 424 F.2d 1037, 1038 (5th Cir. 1970). In this case the officer in charge had to make this determination in a relatively short period. The officer did not believe that he could permit the contraband to be taken to another location and simply left on the street, as he knew was projected. To detain the delivery truck much longer might have aroused the suspicion of the suspects. The officer was further convinced that Woolery's conduct foreclosed all explanations compatible with lawful activity. The conduct of the agents in approaching Woolery was, therefore, supported by probable cause, and the evidence obtained after his arrest is admissible against him.

The order of suppression is therefore

REVERSED.

APPENDIX B

Order on Petition for Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-2156

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

WILLIAM ROBERT WOOLERY,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(April 15, 1982)

Before BROWN, GOLDBERG and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States Circuit Judge

APPENDIX C

Oral Findings of the Trial Court, The Honorable Carl O. Bue, United States District Judge, Southern District of Texas.

"Let me say this to you, preliminarily, that there simply wasn't sufficient time to reduce this to a final document to be handed out to you here. This can be finalized, however, and I'm giving it to you now in the sequence in which it has been thought through.

"It is a very interesting question. And for purposes of taking up the Defendant's motion to suppress, there being two grounds, we'll take each one in turn.

"The first gound, Defendant was unlawfully arrested without a warrant, without going into all of the facts, I will set out certain ones here that I think are particularly germane: The Mercedes had been observed slowing down near the warehouse, apparently following the truck of Mr. Lopez, who went to pick up the package for Mr. Richard Freidman. The Mercedes was parked in a lot adjacent to Lopez' truck and one occupant got out, raised the hood, and appeared to be watching Lopez' truck. The occupant then hurriedly closed the hood when Lopez began to move his truck, and the car followed Lopez' truck to the back of the warehouse. The car was then parked adjacent to the back of the warehouse area and the two occupants stayed in the car and conversed while Lopez' truck was inside the warehouse.

"Then, during the course of interrogating Lopez inside the warehouse, Agent Perry radioed to other officers

outside to approach the Mercedes and ascertain the identity and purpose of its occupants. And Perry so ordered this action, based on the, quote, "suspicious nature of the activities of the car," unquote.

"Now, based on these facts, the Court concludes that when the officers approached the car that the defendant was driving, they had no probable cause to make an arrest. All they had at that point was a reasonable suspicion that the occupants might be engaged in criminal activity.

"I'm citing the cases, see Terry versus Ohio, 392 U.S. One, Adams versus Williams, 407 U.S. 143, Brinegar versus United States, 338 U.S. 160. Compare United States versus Robinson, 414 U.S. 218, and Pennsylvania versus Mims, 434 U.S. 106.

"Proceeding only on reasonable suspicion, which is what we believe existed on these facts, under these circumstances, rather than on probable cause, the officers had the authority only to approach the car and briefly question the occupants to determine their identity and what they were doing there.

"See Adams versus Williams, 407 U.S. 143, Terry versus Ohio, 392 U.S. One, Delaware versus Prouse, 440 U.S. 648.

"Instead of proceeding pursuant to the narrow scope of Perry's order and pursuant to the limited scope of their limited authority under these circumstances, two of the several officers who approached the car walked up with their guns drawn, ordered the occupants out of the car, and simultaneously opened the door on the driver's side of the car. As a consequence of the timing of the officers'

actions, defendant had no opportunity to obey or refuse to obey the order to leave the car before the door was opened. When the door was opened the gun was seen on the inside of the door, and the defendant and the other occupant were placed under arrest.

"Concerning that sequence of events, the arresting officer testified that, quote, "We had probable cause to arrest both occupants of the car, once we got the pistol," unquote.

"Now, whether the officers could request the occupants to get out of the car on only reasonable suspicions without probable cause is questionable. But they clearly could not intrude to the extent of opening the car door before the occupants had an opportunity to obey the order to leave the car.

"See Pennsylvania versus Mimms, 434 U.S. 106, Dunaway versus New York, 442 U.S. 200, Delaware versus Prouse, 440 U.S. 648, Adams versus Williams, 407 U.S. 143, United States versus Brignoni-Ponce, 422 U.S. 873.

"Because the officers violated defendant's Fourth Amendment rights by ordering him to get out of the car and simultaneously opening the driver's door before defendant had any opportunity to obey or disobey the order, the fact that they subsequently found a gun in plain view inside the car door did not give the officers probable cause to arrest the defendant. The officers simply cannot bootstrap the plain view doctrine in such a manner.

"Because the arrest of the defendant was unlawful, his extended detention for purposes of being placed in a line-up was also unlawful. The circumstances herein justified only a brief detention.

"See Terry versus Ohio, 392 U.S. One, Adams versus Williams, 407 U.S. 143, Dunaway versus New York, 442 U.S. 200, United States versus Brignoni-Ponce, 422 U.S. 873, Davis versus Mississippi, 394 U.S. 721, United States versus Hammack, 604 F.2d 437, Fifth Circuit, 1979.

"Now, then, as to Ground Two of the defendant's motion to suppress. The allegation is that the line-up held while defendant was unlawfully in custody was impermissibly suggestive and singled out the defendant as the person to be identified.

"Having reviewed the photographic evidence of the line-up and having heard the relevant testimony, the Court finds that the identification procedure was Constitutional.

"See Neil versus Biggers, 409 U.S. 188, Simmons versus United States, 390 U.S. 377.

"However, inasmuch as defendant's arrest was unlawful, the Court orders that all evidence secured as a direct result of the unlawful arrest must be suppressed.

"See Wong Sun versus United States, 371 U.S. 471.

"Said evidence includes the identifications of the defendant in the line-up which were made by Mr. Lopez and his son, Lawrence Lopez.

"That concludes the ruling on the Defendant's Motion to Suppress." (Statement of Facts, Vol. II, pp. 48-54, emphasis added)

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No. 81-2287

In the Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM ROBERT WOOLERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2287

WILLIAM ROBERT WOOLERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing a pretrial motion to suppress evidence obtained after government agents had stopped an automobile and detained petitioner.

Petitioner was charged in a two-count indictment returned in the United States District Court for the Southern District of Texas with importation of cocaine, in violation of 21 U.S.C. 952(a), and possession of cocaine with intent to distribute, in violation of 21 U.S.C. 846. Following an evidentiary hearing, the district court ruled that government agents had illegally stopped an automobile and arrested petitioner. It thereupon suppressed as evidence all items seized from the automobile, including narcotics paraphernalia and a gun, and also suppressed a subsequent lineup identification of petitioner (Pet. App. C1-C4). The court of appeals reversed, 670 F. 2d 513 (Pet. App. A1-A7).

Petitioner contends (Pet. 3-10) that the court of appeals improperly ignored the factual findings of the district court when it concluded that the agents' stop and search of petitioner's automobile were lawful. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1982

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[1]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

DOJ-1982-07